88-411

IN THE UNITED STATES SUPREME COURT
October Term, 1987
Case No. _____

EDWARD W. MURRAY, DIRECTOR,
DEPARTMENT OF CORRECTIONS,
COMMONWEALTH OF VIRGINIA, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

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-481-1

QUESTION PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW A CIRCUIT COURT ORDER REQUIRING THE COMMONWEALTH OF VIRGINIA TO CREATE A RIGHT TO COUNSEL IN STATE COLLATERAL PROCEEDINGS AND PROVIDE COUNSEL TO ALL STATE COURT LITIGANTS.

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INTEREST OF AMICUS CURIAE

The State of Florida, as Amicus Curiae, is deeply concerned with the en banc decision of the Fourth Circuit for two reasons:

First, Florida has adopted a first in the nation pilot program to provide counsel for indigent death row inmates. We have scrupulously sought to avoid the creation of new grounds for collateral attack (such as "ineffective collateral counsel"), or the creation of new "due process" rights. Florida will have to give serious consideration to abandoning this project.

Second, Florida, like all states, is concerned that unelected federal judges, in the absence of any federal constitutional basis for their action, can by judicial decree, create "state" due process rights and direct the expenditure of public funds

to achieve social objectives not required by the Constitution of the United States.

We will not repeat the arguments set forth by the Commonwealth of Virginia, although we adopt them. We shall raise additional reasons for granting review in this case as perceived by the Amicus Curiae.

SUMMARY OF ARGUMENT

Certiorari should be granted given the conflict between the decision of the en banc Fourth Circuit Court of Appeals and prior decisional law of this Court and the other federal circuits regarding the existence of a "right" to state court collateral attack and collateral counsel.

Certiorari should also be granted pursuant to this Court's supervisory powers to protect the supremacy of your decisions and to correct a "shockingly wrong" lower court decision which carries serious "due process" consequences.

Finally, certiorari should be granted in lieu of this Court's non-discretionary duty to guarantee a "Republican Form of Government" to the people and Commonwealth of Virginia. The Fourth Circuit lacks constitutional authority to declare the existence of a "state" right to collateral

counsel or to usurp the legislative function of directing any expenditure of public funds to protect said "right".

ARGUMENT

The Amicus Curiae has taken the liberty of amending the question presented to add focus to what it perceives as the reasons for granting certiorari. Florida would also suggest that the following constitutional provisions apply:

(1) The Tenth Amendment to the Constitution of the United States says in relevant part:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or the people.

(2) Article IV, Section 4 of the Constitution of the United States says in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government.

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CERTIORARI SHOULD BE GRANTED DUE TO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT AND DECISIONAL LAW OF THIS AND OTHER FEDERAL CIRCUITS.

In **Smith v. Phillips**, 455 U.S. 209, 218 (1982), this Court held that a state cannot be compelled to provide "greater" due process than the federal government. The case at bar involves a decision by the Fourth Circuit that requires Virginia to provide counsel to state court litigants (engaged in post-conviction collateral attack), even though those same litigants, upon filing identical claims pursuant to 28 U.S.C. §§2254 or 2255, would not be guaranteed counsel by the federal courts.

We submit that if the federal government has no obligation to guarantee counsel in every §2254 or §2255 proceeding,

no such obligation can be imposed on a state.

Federal habeas corpus, whether sought pursuant to 28 U.S.C. §2254 or 2255, is a non-constitutional remedy which is not to be equated with constitutional (pre-trial) habeas corpus. In **United States v. MacCollum**, 426 U.S. 317, 323 (1976), this Court held:

> The due process clause of the Fifth Amendment does not establish any right to an appeal . . . and certainly does not establish any right to collaterally attack a final judgment of conviction.

Since no right to collateral attack exists, there is no right to counsel either. **Wainwright v. Torna**, 455 U.S. 586 (1982); see **Ross v. Moffitt**, 417 U.S. 600 (1974); **Johnson v. Avery**, 393 U.S. 483 (1969), see also **Pennsylvania v. Finley**, 481 U.S. _____, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987). Indeed, in §2255 proceedings

the federal judiciary has discretion to appoint or deny counsel based upon the facial complexity of the petition. **Barker v. Ohio**, 330 F.2d 594 (6th Cir. 1964); **Alford v. United States**, 709 F.2d 418 (5th Cir. 1983); **Brown v. United States**, 623 F.2d 54 (9th Cir. 1980); **United States v. De Gand**, 614 F.2d 176 (8th Cir. 1980).

For the Fourth Circuit to impose a mandatory duty on the state to create a system for appointment of counsel in every collateral case, when no such burden has been placed on the federal judiciary, flaunts the Constitution and clearly conflicts with the decisional law of this Court and the other circuits. Such ultra vires conduct cries out for intervention by this Honorable Court.

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CERTIORARI SHOULD BE GRANTED TO CURE ERROR THAT IS "SHOCKINGLY WRONG".

In direct contradiction of the holding of **Smith v. Phillips, supra,** the Fourth Circuit wishes to usurp administrative or supervisory control over the courts of the Commonwealth of Virginia, create "state" rights where no corresponding federal constitutional rights exist and finally to direct the expenditure of public funds to finance the (court) majority's "social engineering scheme".

Certiorari review has traditionally been granted to review lower court errors which are "shockingly wrong" or have true "due process" consequences. **Graver Mfg. v. Linda,** 336 U.S. 271 (1948); **Berenyi v. Immigration Director,** 385 U.S. 630 (1967); **Thompson v. Louisville,** 362 U.S. 199

(1961); see also **Gerstein v. Pugh**, 420 U.S. 103 (1975).

Relying upon the same legal arguments set forth above, we submit that in the absence of "conflict", or in addition thereto, certiorari should be granted due to the shocking and unconscionable conduct of the Fourth Circuit in attempting to impose obligations upon the Commonwealth of Virginia which said Court knew or should have known were not required by the Constitution.

-C-

THE FEDERAL GOVERNMENT HAS A MANDATORY, NOT DISCRETIONARY, DUTY TO PROVIDE ARTICLE IV RELIEF.

It is a fundamental aspect of our constitutional government that the United States "shall", (not "may" or "in its

discretion") guarantee a Republican Form of Government.

It is also an undisputable aspect of state sovereignity that states may create and control their own legal systems so long as federal constitutional standards are not violated.

Virginia, acting within its rights, has created a collateral attack system which is nearly identical to that created by 28 U.S.C. §2255, especially as it relates to the appointment of counsel. Now, a panel of federal judges, acting upon their perceived social aims rather than the Constitution, have legislated a new "state right to counsel" where no such right, state or federal, exists.

It is for the people of Virginia, not the Fourth Circuit, to create any "right" to collateral counsel or any new mechanism for providing same. This essentially

autocratic decision by the Fourth District thus runs afoul of Article IV, compelling correction by this Honorable Court as the agency of the United States uniquely empowered to prevent this abuse.

We respectfully urge this Court to act.

CONCLUSION

We submit that certiorari should be granted to review the decision of the Fourth Circuit. The Court's action is at once autocratic and without any basis in the Constitution. It is also clearly in conflict with the decisional law of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jay Topkis, Steven E. Landers, Alisa D. Shudofsky, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, 1282 Avenue of the Americas, New York, New York 10019; Mr. Jonathan D. Sasser, MOORE & VAN ALLEN, 301 W. Main Street, Suite 800, Durham, N.C. 27702; and to Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKEVY, 720 Southeastern Building, Greensboro, N.C. 27401, this _____ day of September, 1988.

MARK C. MENSER
Assistant Attorney General